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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1978

No. 78-500

JOHN W. BROWN ..... *Petitioner*

VS.

J. C. DANLEY, ADMINISTRATOR ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION

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The opinion of the Supreme Court of Arkansas (Appendix "A" to Petition for Writ of Certiorari) is reported in 263 Ark. 480, 566 S.W.2d 385 (1978). Motion for Rehearing denied June 26, 1978. Motion for Stay to Permit Application to the Supreme Court of the United States for Certiorari denied September 5, 1978.

JURISDICTION

Respondent states that the Petition for Writ of Certiorari sets forth no federal question and this Court should not review judgments of State courts that rest on adequate and independent state grounds.

QUESTIONS PRESENTED

The Petitioner sets forth no question assertedly presented by the Petition for Writ of Certiorari. The Statement of the Case and the Petitioner's argument indicate the question as follows: "Is the petitioner the illegitimate child of Henry Smiley, deceased?"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

United States Constitution, Fifth Amendment:

"no person shall . . . be deprived of life, liberty or property without due process of law . . ."

United States Constitution, Fourteenth Amendment:

". . . nor shall any state deprive any person of life or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes

Arkansas Statutes Annotated, Section 61-103 (1947), *Illegitimate Children — Legitimation by Marriage*:

"Illegitimate children shall be capable of inheriting and transmitting an inheritance, on the part of their mother, in like manner as if they had been legitimate of their mother.

"If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate."

This Statute was re-enacted in 1969 as part of a more comprehensive statute, being *Arkansas Statute Annotated,* Section 61-141 (Supp. 1969) (Repl. 1971).

Illegitimate Children — Concerning the Effect of Illegitimacy on Intestate Succession:

(a) If the parents of a child shall have lived together as a man and wife and, before the birth of their child, shall have participated in a marriage ceremony in apparent compliance with the law of the state where the marriage ceremony was performed, though the attempted marriage be void, their child is deemed to be the legitimate child of both parents for all purposes of Intestate Succession. A child born or conceived during a marriage is presumed to be the legitimate child of both spouses for the same purposes.

(b) If a man have a child or children by a woman, and afterward shall intermarry with her, and shall recognize such child or children to be his, such child or children shall be deemed and considered as legitimate.

(c) Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of Intestate Succession; consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.

(d) An illegitimate child or his descendants may inherit real or personal property in the same manner as a legitimate child from such child's mother or her blood kindred; but such child may not in-

herit real or personal property from his father or fom his father's blood kindred.

(e) Property of an illegitimate person passes in accordance with the usual rules of Intestate succession to his mother and his kindred of her blood; but the father of such person, or the blood kindred of such father, may not inherit from the illegitimate child (or his descendants) either real or personal property.

STATEMENT OF THE CASE

Henry Smiley was a prominent Negro farmer who lived for a number of years on the land he owned in Phillips County, Arkansas.

He married Lela Eldridge in 1910, and they lived together until her death in 1965.

In the year 1937, Inez Hall Brown, natural mother of Petitioner, John W. Brown, Jr., resided with her family on that farm as tenants of Henry Smiley. On May 3, 1937, Inez Hall Brown was legally married to John W. Brown, Sr., now deceased, and on September 19, 1937, the Petitioner, John W. Brown, Jr,. was born. Inez Hall Brown was about three (3) months pregnant at the time of this marriage. The petitioner's Birth Certificate cited that his parents were John W. Brown, Sr. and Inez Hall Brown.

Inez Hall Brown and John W. Brown, Sr. resided within a few miles of each other during the time that conception took place, and they attended the same church and social functions. John W. Brown, Sr. was a friend of Inez Hall Brown's brother and often visited in the home where she resided.

John W. Brown, Sr., his wife, Inez, and John W. Brown, Jr. lived together until the death of John W. Brown, Sr. the following year.

Viola Franklin, Mayme Smith Trudo, Susie Smith Campbell and Christine Brown, first cousins of the late Henry Smiley, filed a verified Petition for Appointment of Administrator with the Probate Court of Phillips County, Arkansas, asking that J. C. Danley, a first cousin of Henry Smiley, be appointed Administrator of his estate.

On April 21, 1976, the trial court entered its Order appointing J. C. Danley as Administrator of the Estate of Henry Smiley, deceased, and Letters of Administration were issued.

Thereafter, the Petitioner, John W. Brown, Jr., filed a Petition with the trial court to set aside the Order of the court appointing J. C. Danley as Administrator and asking the court to appoint him as Administrator and to make a determination that he was the illegitimate son of the late Henry Smiley and heir to a sizeable estate. Appellant, John W. Brown, Jr., also asked the court to declare Arkansas Statute 61-141(d) unconstitutional as violative of the *Fifth and Fourteenth Amendments to the Constitution of the United States.*

Following the hearing the Probate Court found for the respondent and determined that John W. Brown, Jr., petitioner, was not the illegitimate son of Henry Smiley, deceased, but was, in fact, born in lawful wedlock to Inez Hall Brown and John W. Brown, Sr. and was entitled to all protection which arises from that legal status.

The decision of the Probate Court of Phillips County, Arkansas, was appealed to the Arkansas Supreme Court and that Court affirmed the decision of the lower court and held that Petitioner was not an illegitimate child, but to the contrary was born during lawful wedlock, the son of Henry Smiley, deceased, and that he had not been denied equal protection of the law.

ARGUMENT

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

"By writ of certiorari, where the validity of a . . . statute of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States . . ." 28 USCA Section 1257(3).

To have standing to attack the constitutionality of a statute, a party must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the statute's enforcement. *Cramp v. Board of Public Instruction of Orange County, Fla.,* (Fla. 1961), 82 S. Ct. 275, 368 U.S. 278, 7 L. Ed. 2d *on remand* 137 So. 2d 823. Only those to whom a statute applies and who are adversely affected as the result of a denial of constitutional rights can invoke jurisdiction of Supreme Court on constitutional questions. *Voeller v. Neilston Warehouse Co.,* (Ohio 1941), 61 S. Ct. 376, 311 U.S. 531, 85 L. Ed. 322.

Whether a federal question is properly raised in the trial court of a state is a question of state practice, and if it is passed upon and denied by the highest court of the state the Supreme Court of the United States has jurisdiction to review the judgment of the state court, *North Carolina R. Co. v. Zachary,* (N.C. 1914), 34 S. Ct. 305, 232 U.S. 248, 58 L. Ed. 591, Ann. Cas. 1914 C. 159.

Respondent submits that no federal question has been raised, because neither the trial court nor the Supreme Court of Arkansas reached the question of constitutionality of the statute in question thereby presenting a federal issue.

The most important limitation on Supreme Court review of state court decisions has been well stated by Justice Jackson: "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 1945, 65 S. Ct. 459, 463, 324 U.S. 117, 125-126, 89 L. Ed. 789.

Under the present statute, review is possible of the final judgment of the highest court of a state in which a decision could be had in any case where the validity of a state statute is drawn into question on the ground of its being repugnant to the Constitution. 28 USCA Section 1257 (3). Respondent cites *Erie R. Co. v. Thompkins*, 304 U.S. 64, 58 S. Ct. 817 to support this view as controlling in that: "*Except in matters governed by the Federal Constitution* . . . the law to be applied in any case is the law of the state . . ." (Emphasis added).

The trial court determined that Petitioner was born in lawful wedlock to his mother and father and is entitled to and will receive all the protection which arises from that status. The Supreme Court of Arkansas stated as follows:

> "The pivotal question, then, is whether our presumptions and rules of evidence are valid. Preliminarily, the appellant's agreement presupposes the unconstitutionality of our statute which permits illegitimate children to inherit from their mothers but not from their fathers. Section 61-141(d). A similar statute was held unconstitutional in *Trimble v. Gordon*, 430 U.S. 762 (1977), although in that case the illegitimate child had been both acknowledged as and judicially determined to be the asserted father's daughter. We need not determine whether that factual distinction between the cases makes any difference, because we would reach the same conclusion in this case even if our statute were held to be invalid."

Neither the trial court nor the Arkansas Supreme Court reached the constitutionality of the statute in question. Constitutional questions are not passed upon when litigation is disposed of without reaching constitutional questions.

However, assuming that a federal question were raised, petitioner, in order to reach that question must bring himself within a class of persons entitled to raise it, that is, he must prove by a preponderance of the evidence that he is illegitimate. As earlier stated, Petitioner's mother and father were legally married and petitioner's Birth Certificate cited that they were his parents. Obvic. ly petitioner fails to bring himself within the class of persons entitled to raise such an issue.

The policy of the law requires that every reasonable presumption be made in favor of legitimacy, and places the burden of proof on the person alleging illegitimacy. The presumption of legitimacy is not limited to those cases where marriage is claimed or proved and the non-access of the husband is at issue. It has a wider application and applies to every case where the question is at issue. It is based upon broad principles of natural justice and the supposed virtue of the mother. It is a branch of that general rule of equity and justice which assumes the innocence of a person until there is proof of actual guilt, and whenever it is consistent with the facts proved, the presumption is controlling. 10 Am. Jur. 2d, *Bastards*, Section 10.

In Arkansas there is a statutory presumption that a child born during a marriage is the legitimate child of both

spouses. *Arkansas Statute Annotated Section* 61-141(a) (Repl. 1971), *supra,* and it is buttressed by the common law presumption that a child born to a married couple is the child of the husband.

This presumption, one of the strongest known to law, which antedates our independence as a nation, was brought to this country as part of the common law from England.

This presumption continues until overcome by the clearest evidence that the husband was impotent or without access to his wife. *Reed v. Stolt,* 222 Ark. 119, 257 S.W.2d 362 (1953). *In re Thomas Estate,* 228 Ark. 658, 310 S.W.2d 248 (1958).

A corollary to this rule arose in our law as early as 1734 and was so clarified and strengthened by Lord Mansfield and is known as "Lord Mansfield's Rule." This rule restricts the testimony of the married mother to evidence tending to prove non-access. While she is held competent to testify to facts which "tend to prove" that he could not have had access to her due to separation by time and distance, she is incompetent to testify to the single fact of non-access. She is restricted to such testimony as to his whereabouts which would tend to show intercourse with him impossible at the time of conception, but she may not testify that she did not have intercourse with him during this period.

Petitioner states that Lord Mansfield's Rule that prohibits a husband and wife testifying concerning non-access on the issue of paternity of a child born after their marriage is unduly burdensome and effectively denies petitioner equal access to the Judicial System, Equal Protection and Due Process.

Admittedly several states have abolished the rule. However, these decisions have emphasized the strength of the presumption of legitimacy. In *Serafin v. Serafin,* 258 N.W.2d 461 (Mich. 1977) the Supreme Court of Michigan held that the rule violated due process. Although the rule was abolished, the court stated "the child is also guarded by the still viable and strong, though rebuttable, presumption of legitimacy" and held that "clear and convincing" evidence is needed to rebut the presumption. Coleman, J., joined by Williams, J., filed a concurring opinion highlighting the interests of the children affected by abolishing the rule and emphasizing the strength of the presumption of legitimacy.

The presumption of legitimacy, according to Justice Coleman, "is one of the strongest presumptions known to law." As for the clear and convincing evidence required to rebut the presumption, he urged:

> "Judges must be careful to apply this stringent standard scrupulously, regardless of their personal view of the evidence, in order to protect the important societal objections that are the basis for the presumption."

Arkansas Statute Annotated, Section 61-103 (1947) reads as follows:

> ". . . if a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate."

This statute was re-enacted in 1969 as part of a more comprehensive statute, being *Arkansas Statute Annotated Section* 61-141 (Supp. 1969) (Repl. 1971). This section reads in part as follows:

"(a) If the parents of a child shall have lived together as man and wife and, before the birth of their child, shall have participated in a marriage ceremony in apparent compliance with the law of the state where the marriage ceremony was performed, though the attempted marriage be void, their child is deemed to be the legitimate child of both parents for all purposes of Intestate succession a child born or conceived during a marriage is presumed to be the legitimate child of both spouses for the same purposes."

"(b) If a man have a child or children by a woman, and afterward shall intermarry with her, and shall recognize such child or children to be his, such child or children shall be deemed and considered as legitimate."

The Arkansas Supreme Court held in the case of *Parker v. Hadley*, 227 Ark. 161, 296 S.W.2d 391 (1956) that *Arkansas Statute Annotated Section* 61-103 (1947) requires proof of three (3) essential elements: (1) the actual parentage of the putative father; (2) the putative father's marriage to the mother of the illegitimate child; and (3) recognition by the putative father, after the marriage, of the child as his own. See, also, *Jeffery Cook Bell v. Anita C. Bell, Administratrix, et al*, 249 Ark. 959, 462 S.W.2d 387 (1971).

The trial court found, upon proof that is undisputed, that requirements (1) and (2) had not been established.

Petitioner states that the Supreme Court of Arkansas failed to apply and misconstrued *Trimble v. Godon, supra.* Obviously, this is not so. The *Trimble* case is very interesting, because it involved the constitutionality of the Illinois Code's distinction between legitimate and illegitimate children for purposes of intestate succession, under which distinction of illegitimate children are permitted to inherit

from their mother, while legitimate children are permitted to inherit from their mothers and fathers; the Probate Division of the Circuit Court of Cook County, Illinois, excluded from heirship the illegitimate daughter of an intestate father. The case was ultimately appealed to the United States Supreme Court and reversed and remanded. Section Twelve (12) of the Illinois Probate Code was determined to be unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Respondent readily admits that the Illinois Statute is very similar to the Arkansas Statute; however, respondent states that the child was illegitimate and not legitimate and the case is distinguishable on that basis. It is further submitted that this case does not overrule *Jeffery Cook Bell v. v. Anita C. Bell, Administratrix, et al*, 249 Ark. 959, 462 S.W. 2d 387 (1971) as contended by Petitioner.

CONCLUSION

For the reasons stated above, Respondent says that a Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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